money then owing on the note in trust for certain named beneficiaries, released defendant's obligation on the note. It was contended that the defendant thereby became the trustee of the money for the beneficiaries and purposes named. There was no segregation of the fund, no payment on account of the trust, and the beneficiaries were not informed of it. The District Court of Appeal said that these last-named elements were merely evidentiary matters of importance in determining whether or not a trust was declared, and reversed a judgment for plaintiff given on the pleadings.

If there had been a release of the note, and a declaration of trust as set forth in the answer, and if the defendant had set aside the sum due on the note in a special fund and held it in trust for the beneficiaries, all the requisites of a valid trust would have been present. But if no segregation was made the objection arises that one of the requisites of a trust, a specific trust res, is lacking. A trust res need not consist of tangible property. Intangible property, a specific obligation against a third person, may constitute the trust res. Logically, where there is no segregation, the defendant merely holds a debt against himself of the amount due on the note for the beneficiaries. Our law has not considered John Jones, the individual, and John Jones, trustee, as being such separate and distinct legal persons that the latter as trustee can sue himself as an individual; and has not, except in a few cases, treated such a debt against himself as sufficient to constitute a trust res. The cases of M'Fadden v. Jenkyns[2] and Eaton v. Cook,[3] cited in the opinion of the District Court of Appeal, have been generally criticised for failing to distinguish between a trust and a debt,[4] and fail to emphasize the necessity of a specific trust res.[5]

As the principal case was presented solely on the pleadings, which definitely alleged the release of the debt and the creation of a trust, it was proper that the case should be sent back for trial, that the actual facts might be determined.

O. K. P.

WILLS: REQUISITES OF A NUNCUPATIVE WILL.—In the attempt to carry out the wishes of a deceased person expressed in an invalid will, the query has sometimes been made, may the oral statements of the testator at the time of executing the invalid will be

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[2] (1842), 1 Ph. Ch. 153.

[3] (1874), 25 N. J. Eq. 55.

[4] In a note to M'Fadden v. Jenkyns in 1 Ames, Cases on Trusts, 2d. ed., p. 48, the editor says, "Lord Lyndhurst is not alone among eminent judges, in failing to discriminate between a trust and a debt."

[5] The English courts have not recognized the enforceability by a third person of contracts made for his benefit. In order to give a remedy in cases like M'Fadden v. Jenkyns, they have accordingly stretched the law of trusts. 15 Harvard Law Review, 767.

enforced as a nuncupative will? Such statements have been generally denied probate as an oral will,[1] as they were in the case of *Brown v. State.*[2] Nuncupative wills have received a strict construction because of the opportunity they afford for fraud and perjury. It is held, therefore, that a person must have not only a testamentary intention, but he must have an intention to make a nuncupative testament in order that his instructions for the preparation of a testamentary instrument may constitute a will of that character. Even where death suddenly intervenes between the giving of such instructions and the execution of the will, the desires of the testator have not been given effect as a valid oral will.[3]

If state statutes require all wills to be in writing there can be no valid nuncupative will.[4] Where statutes impose certain formalities or requisites upon the making of such wills the courts generally hold that an exact compliance with the statute is necessary.[5] The right to make a nuncupative will is restricted to a "man who lieth languishing for fear of sudden death,"[6] and to sailors at sea, and soldiers in active service[7] where the perils of the sea, or presence of the enemy furnish sufficient fear of death. In the case of a sick person he must be in his last illness,[8] but his will is not necessarily void if he lingers long enough to make a written will.[9] California restricts the right to make a nuncupative will to soldiers and sailors in actual fear or peril of death, and to persons "at the time in expectation of immediate death from an injury received the same day."[10] This provision has so restricted the parties able to make a nuncupative will, and limited the possible meaning of last illness that no cases have ever arisen concerning the validity of an oral will in this jurisdiction.

Ordinarily real property cannot be conveyed by a nuncupative will.[11] Often the amount of personalty which may be so con-

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[1] In re Male's Will (1892), 49 N. J. Eq. 266, 24 Atl. 370; In re Will of Hebden (1869), 20 N. J. Eq. 473; In re Wiley's Estate (1898), 187 Pa. St. 82, 40 Atl. 980; Kennedy v. Douglas (1909), 151 N. C. 336, 66 S. E. 216.

[2] Brown v. State (Wash., Aug. 20, 1915), 151 Pac. 81.

[3] In re Grossman's Estate (1898), 175 Ill. 425, 51 N. E. 750; In re Male's Will (1892), 49 N. J. Eq. 266, 24 Atl. 370.

[4] Appeal of Stone (1901), 74 Conn. 301, 50 Atl. 734.

[5] Bundrick v. Haygood (1890), 106 N. C. 468, 11 S. E. 423; Mitchell v. Vickers (1857), 20 Tex. 377; Scales v. Thornton (1903), 118 Ga. 93, 44 S. E. 857.

[6] Hubbard v. Hubbard (1853), 8 N. Y. 196; In re O'Connor's Will (1909), 65 Misc. Rep. 403, 121 N. Y. Supp. 903.

[7] Leathers v. Greenacre (1866), 53 Me. 561.

[8] Donald v. Unger (1897), 75 Miss. 294, 22 So. 803; Godfrey v. Smith (1905), 73 Neb. 756, 103 N. W. 450; Scaife v. Emmons (1890), 84 Ga. 619, 10 S. E. 1097.

[9] Baird v. Baird (1905), 70 Kan. 564, 79 Pac. 163; Smith v. Salter (1902), 115 Ga. 286, 41 S. E. 621.

[10] Cal. Civ. Code, § 1289.

[11] Furrh v. Winston (1886), 66 Tex. 521, 1 S. W. 527; In re Kelby's

veyed is limited. The question whether real property could not be so disposed of arose in Texas under a general provision that "a person may by last will and testament dispose of his estate both real and personal." There were no restrictions as to the character of the property conveyed by an oral will. But it was held that the historic rule that follows from the common law, that only personalty may be conveyed by oral wills, was sufficient to prevent such a will conveying realty.[12] The same question might arise in California as the Civil Code makes a general testamentary provision.[13] But there is an additional reason for adopting the common law in California, because of the stipulation that "the estate bequeathed must not exceed in value the sum of one thousand dollars." Is "bequeathed" to be construed with its strict technical meaning, and is the limitation in value indicative of an intention to restrict to personalty?[14]

E. B. B.

Will (1854), Fed. Cas. No. 18, 306; In re Male's Will (1892), 49 N. J. Eq. 266, 24 Atl. 370, Contra, Gillis v. Weller (1841), 10 Ohio, 463.

[12] Lewis v. Aylott's Heirs (1876), 45 Tex. 190.

[13] Cal. Civ. Code, §§ 1270, 1289.

[14] For an instance where the technical distinction between "devise" and "bequest" was observed, see Estate of Ross (1903), 140 Cal. 282, 73 Pac. 976.